BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,269

JOSEPH YOUNG, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Cr. No. 1019-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did the trial court err in not declaring a mistrial or continuing the trial until an accomplice of the appellant, who had recently pled guilty to one of the two counts in the indictment, would not risk self-incrimination by testifying in support of appellant's story?

2) Was appellant's recent prior conviction for assault with intent to commit carnal knowledge admissible to impeach his credibility in his trial for housebreaking and larceny?

3) Is there a reasonable chance that, consistent with the court's charge here, because the court did not specify that an "aider and abettor" must have wilfully participated in the offense, the jury convicted appellant on a theory supporting his innocence?

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COUNTERSTATEMENT OF THE CASE

Appellant was convicted by a jury on March 29th and 30th, 1966, of the offenses of housebreaking (D.C. Code § 22-1801) and larceny (D.C. Code § 22-2201). The jury also was charged on the aiding and abetting statute. (D.C. Code § 22-105).

Appellant was arrested at about 4:15 a.m. on August 21, 1965, as he was driving his car several blocks from the scene of the housebreaking and larceny involved in this case (Tr. 41), which had occurred just a few min-

utes before (Tr. 26-27, 41). A large calculating machine and an electric typewriter were found in his trunk (Tr. 44). The numbers on these machines matched those on the ones stolen (Tr. 45-6). A witness to the crime had written down the license number on the car used by the two criminals, and this number matched that on appellant's car. (Tr. 28, 40). The witness, however, was unable to identify the two men involved in the offense (Tr. 27-29, 36). At the close of the prosecution's case appellant made a motion for acquittal (Tr. 56), and one for a continuance or mistrial in order to procure the testimony of appellant's co-indictee, who had recently pled guilty to the larceny charge (Tr. 57-59). These were denied. Appellant's evidence consisted of the testimony of two relatives, an old friend, his girl friend, and himself. Before he testified his counsel requested that evidence of his prior conviction for assault with intent to commit carnal knowledge be disallowed for impeachment purposes (Tr. 77-81), and after extended discussion, this request was denied. Appellant testified that he had left a party that night at about 12:30, gone to his girl friend's house with Williams, his co-indictee, and at about 1:15-1:30 a.m. had gone home and to sleep, having lent his car to Williams (Tr. 82-84). He was awakened once by a phone call from his girl friend, and again by Williams, who returned his car about 4:00 a.m. (Tr. 84-85). He was taking Williams home when they were stopped by the police and the stolen goods were found in his trunk (Tr. 85). He denied participating in the crime or knowing about the stolen goods (Tr. 86-87). He said he had his bedroom slippers on at the time of his arrest (Tr. 99), and the arresting officers couldn't recall specifically what was on his feet (Tr. 101).

Appellant's sister testified she saw appellant asleep in bed at 2:00 a.m. when she returned from a date (Tr. 71), and his mother said she awoke after he returned and saw him in bed at about 2:00 a.m. (Tr. 96). Both heard the phone ring about 2:15 a.m. (Tr. 72, 98).

Neither knew what or where defendant was after that time (Tr. 73, 98). In addition, an old friend testified he came around to appellant's house at about 3:15 a.m. to borrow his car, and upon knocking and entering, saw appellant asleep and went out (Tr. 75). Appellant's girl friend testified she saw appellant at the time he indicated he saw her and called him on the phone at about 2:10 a.m. (Tr. 92-93).

SUMMARY OF ARGUMENT

The trial court properly denied appellant's motion for a mistrial or continuance until Williams, appellant's co-indictee who had pled guilty to the larceny charge several weeks before and was awaiting sentence, would no longer risk prosecution for the housebreaking charge—which the government had apparently indicated it would drop after sentencing on the larceny plea—and could therefore testify without incrimination. There was no reasonable certainty that Williams would ever so testify within the foreseeable future. If a "plea bargain" existed, it was obviously contingent upon Williams receiving a satisfactory sentence on the larceny count. And if the government violated its "bargain," the court could not have enforced it by granting the witness immunity. There was no assurance that Williams would not withdraw his plea anytime before sentence and demand a jury trial. Many continuances had already been granted appellant, and his counsel admitted having "made no contact with him (Williams) prior to this date as to what his testimony would be." (Tr. 65). Furthermore, the compilation of a Probation Report often takes many months. In these circumstances to have granted appellant's motion might have been an abuse of discretion.

The trial court carefully exercised discretion under *Luck* v. *United States*, in allowing appellant's prior conviction for assault with intent to commit carnal knowledge to be introduced before the jury to impeach appellant's testimonial credit. Argument on the point was extended and many relevant considerations were before

the court. This Court's function under *Luck* is to ensure that judicial discretion is exercised; the result of a particular exercise of discretion will not be overturned on review. This is because only the trial judge can bring appropriate experiences to bear upon the facts of each case as they develop before him. Congress has long sanctioned the use, for impeachment, of prior convictions of any felony or misdemeanor, not including violations of municipal ordinances or offenses not triable by jury, under decisions of this Court explicitly holding that prior convictions similar to the one involved here may be so used. However, since a recent decision implied in dictum that some members of this Court were interested in tightening up this long-standing, Congressionally adopted construction of D.C. Code § 14-305, to dispel any possible confusion this Court should reaffirm its unwillingness and lack of power to do so.

Although the trial court did not explicitly instruct the jury that in order to convict appellant as an "aider and abettor" the prosecution must prove that he wilfully participated in the offense charged, this fact was unavoidably and patently clear from the instructions that were given. The jury was told that an aider and abettor "is just as responsible under the law as the person who commits a physical act which violates the law." (Tr. 131.) Judge Matthews repeatedly hammered home that both housebreaking and larceny are crimes of intent. It is absurd to suggest that a juror would, in these circumstances, convict appellant for possessing a degree of *mens rea*, innocent or merely "knowing", for which it would have clearly been impossible to convict the principal actor. Appellant's defense at trial was that he did not know of the stolen goods and had not participated in the crime. In the context of the facts of this case, it could only be whimsy to conclude that the jury convicted appellant on a theory of innocence. The overall charge was, moreover, totally correct and totally fair to appellant.

ARGUMENT

I. The trial court did not err in denying appellant's motion to declare a mistrial or continue the case until the testimony of a co-indictee might become available, because this was not apparent with any reasonable certainty.

(Tr. 58-60, 62, 65, 71-72, 80, 82-85, 86-87, 92-93, 96, 98)

Appellant contends that the trial court erred in refusing his motion for a mistrial or a continuance in order to procure the testimony of appellant's co-indictee, Thomas Williams, and asks this Court to reverse his conviction on that ground.[1] The circumstances are undisputed. The trial on March 29th began at 10:10 a.m. before Judge Matthews and a jury, and proceeded until about noon with the government's case, at the close of which appellant's counsel moved for a judgment of acquittal. During the colloquy, appellant's counsel stated that Williams had appeared in the courtroom, "much to my surprise," (Tr. 58-59, 60, 89) and that he was "going to call him." He "never thought that Williams would come down." (Tr. 58). He had "made no contact with him prior to this date as to what his testimony would be. This morning the defendant (sic) voluntarily came to the courthouse and spoke to me and told me what I expect his testimony would be * * *," (Tr. 65), that is, "that Young was not with him and that subsequently he went to Young's

[1] Counsel suggests the trial court should have recessed to investigate the possibility of accelerating the sentencing date. But, as Judge Matthews noted, sentencing is contingent on a probation report, and is not simply a docket problem. Also, counsel's suggestion that the court should have explored with the United States attorney the possibilities for immediately dismissing the charge raises an ethical problem about the role of trial courts in "plea bargaining". See Canons of Judicial Ethics 1, 15. At any rate, these suggestions were not presented to the trial court, which was thereby deprived of any opportunity to act upon them. See *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

house and Young was driving him home." (Tr. 58). In light of the self-incrimination problems, it was agreed that "he ought to have his attorney here," (Tr. 58), and the court recessed for lunch and in order to procure him. On reconvening, it appeared that Williams had been indicted on two counts, housebreaking and larceny, and that eighteen days earlier he had pled guilty to larceny and was then awaiting sentence. His counsel stated that "the government will drop [the housebreaking count] when he is sentenced on the larceny count, but as it now stands the count is still outstanding and the government indicates that they could prosecute him under that count." He therefore told his client to invoke the Fifth Amendment (Tr. 62), and Williams indicated that if called to the stand he would decline to testify. Appellant's counsel suggested that after sentencing and expiration of time for appeal on the larceny count, and after the government dropped the housebreaking count, Williams could no longer claim the privilege. Judge Matthews said she "guessed" they would drop the housebreaking count after sentencing, "[b]ut, of course, he only pled the other day, he only pled the 11th of March and I don't imagine any probation report would be ready for quite a little while. *Mr. Garber*: It might not be, it might be that he won't be sentenced until sometime in April." (Tr. 67). In denying appellant motion for a mistrial or continuance until Williams could no longer claim the privilege, Judge Matthews catalogued these reasons: the indictment was returned in September, 1965: appellant procured three continuances from November 12, 1965 to March 1, 1966: three more continuances were entered between March 1st and March 29th, Judge Matthews told appellant that "you had a good many continuances." "Now, the government has called all its witnesses down here and has put them on, so I am not going to continue it." (Tr. 68.)

Under the circumstances of this case one could hardly say that Judge Matthews abused her discretion in denying this continuance. Although the trial was not enor-

mously long, the government's proof was in when the motion was made, and this proof consumes 53 pages of the transcript and took several hours of court time to present. To have called a mistrial would have meant the waste of the morning's proceedings, and a continuance would have meant the risk of fading memories and dilution of the evidentiary impact. The mistrial technique is reserved for only compelling instances of need, and continuances, although more readily available, ordinarily should not be granted where, as here, the prospects of the evidence being available with reasonable assurance and within a reasonably short period of time are dim. See *Neufield* v. *United States*, 73 App. D.C. 174, 168 F.2d 375, 380 (1941), *cert. denied*, 315 U.S. 798 (1942); *Woods* v. *United States*, 26 F.2d 63, 64 (8th Cir. 1928). Williams had indicated he would not testify until the risk of prosecution was removed. Under this formula, at appellant's trial on March 29th there was no assurance that Williams would testify at any time in the near future. In fact, he was not sentenced until May 13, 1966, over six weeks after the issue was raised in this case. By this time the jurors' memories would have been blank slates. Williams could have withdrawn his plea on the larceny count any time before sentencing, (Rule 32(d), FED. R. CRIM. P.), and could have demanded a jury trial, thereby setting off his court date further into the dim future. There was, furthermore, no assurance that the prosecution would drop the housebreaking charge even if Williams were sentenced on the larceny count, or that this charge would not be reinstated, if not dismissed with prejudice, sometime before the applicable statute of limitations expired. *Cf. Earl* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 531 (1966). In cases where a defendant has testified against another upon the assurance of the prosecutor that some charge against him would be dropped, courts have indicated that they would indirectly enforce the assurance—to the extent of opening a prior guilty plea entered on the understanding the cause would be *nolled* after the defendant testified,

Machibroda v. *United States*, 368 U.S. 487 (1962); *People* v. *Bogolowski*, 317 Ill. 460, 148 N.E. 260 (1925), or by "continuing the cause until an application can be made for a pardon." *United States* v. *Lee*, 26 Fed. Cas. 910, 911, No. 15,588 (4 McLean 103) (Cir. Ct. Dist. of Ill. 1846 [2]). But courts are chary of enforcing immunity against prosecution even where an express "plea bargain" has been made, see *United States* v. *Lee*, *supra*; *Earl* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 531, 534 (1966), because of "the complexity and difficulty of evaluating the impact of that course." In a case where the defense sought the court to grant immunity from prosecution to a co-indictee witness, this Court recently concluded "that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." *Earl*, *supra* at 534. The question of immunity from punishment under our system is "committed largely to the discretion of the states' attorney" or prosecutor, *People* v. *Bogolowski*, *supra* at 262.

Obviously, therefore, it was far from clear that Williams would not be subject to possible self-incrimination even after sentencing on the larceny count and dismissal of the housebreaking count. Williams himself had never indicated to the court that he would in fact testify in the manner indicated by appellant's counsel even if, upon sentencing, the housebreaking charge were dropped. And

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[2] In *Lee*, the court explained that: "An accomplice is used by the government because his evidence is necessary to a conviction. Being called as a witness, there is an implied obligation by the government, if not expressed, that if the witness shall make a full and honest disclosure of the facts, which have a direct bearing on the case, he shall not be prosecuted. * * * The government is bound in honor, under the circumstances, to carry out the understanding or arrangement, by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court. If the district attorney shall fail to enter a nolle prosequi on the indictment against Lee, the court will continue the cause until an application can be made for a pardon." *Supra* at 911. This theory would not apply where, as here, it is the defense which seeks the witness' testimony.

the government's "promise," if any, to drop the second charge was obviously contingent upon a satisfactory sentence being imposed on the larceny plea. Otherwise there would have been no reason to delay decision until that sentencing. In these circumstances there was certainly no reasonable certitude that Williams would be available even after another long delay in this oft-delayed trial.

It is questionable, moreover, whether his testimony would have "materially strengthened" the defense. See *Woods* v. *United States, supra* at 64; *Neufield* v. *United States, supra* at 380; *Babb* v. *United States,* 210 F.2d 473 (5th Cir. 1954). It is clear from the record that appellant in no way intended to rely upon Williams' testimony in presenting his defense. Williams' appearance at trial either before or during the prosecution's case was utterly fortuitous and unexpected by appellant.[3] He had "made no contact with him prior to this date as to what his testimony would be." (Tr. 65). Under these circumstances, it is hardly compelling to argue that the testimony of this convicted accomplice would have had significant impact on his case. As the following summary shows, that testimony would at most only have duplicated appellant's and the jury would have received it with the utmost suspicion.

Appellant's story was that he left a party that night at about 12:30, went to his girl friend's house with Williams, and at about 1:15-1:30 a.m. went home and to sleep, having lent Williams his car. He was awakened once by a phone call from his girl friend and then again by Williams, who returned with his car about 4:00 in the morning. He was driving Williams home when the police stopped them and the stolen goods were found in the trunk. (Tr. 82-85.) He denied participating in the crime or knowing about the stolen goods. (Tr. 86-87). In support of his defense, appellant's sister testified she

[3] Appellant's counsel stated Williams' appearance was "much to my surprise," and "I never thought Williams would come down, but he has appeared this morning." (Tr. 60, 58-9, 80).

saw appellant in bed asleep at 2:00 a.m. when she returned from a date (Tr. 71), and his mother testified she awoke after he returned and saw him in bed at about 2:00 a.m. (Tr. 96). Both heard the phone ring about 2:15 a.m. (Tr. 72, 98). In addition, an old friend testified he came around to appellant's house at about 3:15 a.m. to borrow his car, and upon knocking and entering, saw appellant asleep and went out (Tr. 75). Appellant's girl friend testified she saw appellant at the time he described and called him at home at about 2:10 a.m. (Tr. 92-93).

Appellant's counsel summarized Williams' putative testimony as follows: "I think his testimony will be that Young was not with him and that subsequently he went to Young's house and Young was driving him home." (Tr. 58). This cursory kernel shows Williams' testimony would have added nothing except another mouth to appellant's own story; it would have been "merely cumulative" and would have injected nothing new into the case. See *Ray* v. *United States,* 352 F.2d 521 (5th Cir. 1965); *cf. United States* v. *White,* 324 F.2d 814, 816 (2d Cir. 1963). This circumstance, coupled with the uncertainty that Williams would ever appear and the fact stressed by Judge Matthews that many continuances had already been obtained, see *Leino* v. *United States,* 338 F.2d 154 (10th Cir. 1964), amply support the decision to proceed on with trial. Either a continuance or a mistrial would have been unjustified.

United States v. *White, supra,* relied upon by appellant, does not impede this conclusion. There the defendant was indicted for the sale of narcotics and at trial sought to advance entrapment as his sole defense. The only other observer of the incident was the government's informer, who was "sick" at the time of trial, and a doctor testified that he definitely would be available in "a couple of weeks." Defendant's motion for adjournment was denied, but this was subsequently reversed. The court said that "There was no other way for appellant

to substantiate his defense. Thus, the testimony sought to be adduced would not have been merely cumulative and would (have) done more than impeach the Government witnesses. * * * Entrapment, if he could prove it, was his only hope." (*Id.* at 815-16). In these circumstances, the court correctly concluded that an adjournment for "a couple of weeks * * * would not have been an unduly burdensome hiatus in the trial." (*Ibid.*).

The fixed, short time element in *White* sharply marks it off from this case. Here the only issue was whether the presumption of crime arising from recent possession of stolen goods was effectively rebutted by appellant's story of non-participation. The jury could have believed all witnesses but appellant and still have convicted him. Williams, an accomplice in the crimes, would have added little by testifying in corroboration of appellant's story.

II. The trial court properly exercised its discretion in refusing to exclude evidence of appellant's prior conviction introduced to impeach his testimonial credit.

(Tr. 77-80, 90-91)

Before appellant took the stand in his own behalf, his counsel sought to have the trial court rule that his 1962 conviction for assault with intent to commit carnal knowledge could not be used to impeach him under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Counsel informed the court that appellant was sentenced under the Federal Youth Corrections Act, and that convictions under that act are expunged upon satisfactory termination of parole. In other words, appellant "might not have a conviction in the future." (Tr. 78.) He was then on parole. His counsel argued further that the prior crime was "not like" the crime for which he was then on trial. Appellant had been charged with carnal knowledge and pled guilty to the lesser included offense of assault with intent to commit carnal knowledge. (Tr. 79.) The victim was "a girl under 16" and the of-

fense "might have been statutory," although he didn't "know what the facts were." Appellant's counsel stated that "we have a situation where a defendant was charged with two very serious offenses and I submit that a conviction of that type, assault with intent to commit carnal knowledge where it may be a statutory type of offense, certainly cannot be used to impeach the credibility of the defendant." (Tr. 79-80). "*The Court*: You know, since Luck, everybody who comes in here who has a defendant who has been convicted, there is not one single one who thinks his conviction should come in. *Mr. Garber*: I realize that, Your Honor. If he had been convicted of grand larceny, I might not have too much standing. He was a defendant that apparently the Judge who sentenced him felt that it would merit the consideration of the Youth Correction Act and it is a question of trying to balance the scales." (Tr. 80.) Appellant had also been convicted of another crime but it was in the "process of appeal" and could not be inquired into. *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949). After this hearing, appellant's request was denied (Tr. 80), and subsequently he was asked about the offense. (Tr. 90-91).

The record amply discloses that Judge Matthews considered many factors before ruling against appellant on the admission of his prior conviction. The "nature of the prior crime" (*Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763, 769 (1965)) was probed and even its "equitable" circumstances pryed into; that prior crime was different from the one at trial. The fact appellant was sentenced under the Youth Corrections Act, a factor indicated by this Court to be "highly relevant" to the determination of admissibility (*Brown* v. *United States*, No. 20,041, November 10, 1966 (slip op. at 8, n. 10)), was discussed, as was the circumstance that he had pled guilty to a lesser offense. Both the prosecution and the defense agreed that the prior crime was "very serious." (Tr. 77, 79). It was also quite recent. Although the court gave no reason for denying appellant's request, it is apparent

that the denial was based upon "individualized considerations," not "abstractions" (*cf. Brown, supra* at 5-6), and that the utmost "discretion" was employed.

In *Luck*, this Court indicated that in exercising "discretion," "a number of factors might be relevant * * *. The goal of a criminal charge is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between the interests of the defendant and of the public. * * * The matter is, we reiterate, one for exercise of discretion; and, as is generally in accord with sound judicial administration, that discretion is to be accorded a respect appropriately reflective of the inescapable remoteness of judicial review." *Luck* v. *United States, supra* at 769. The prior offense here was a felony (*cf. Clawans* v. *District of Columbia*, 61 App. D.C. 298, 62 F.2d 383 (1932); *Pinkney* v. *United States*, No. 19,925, July 8, 1966 (D.C. Cir.)) involving moral turpitude", which would have disqualified appellant as a witness at common law. See MCCORMICK, EVIDENCE § 43 (1954); 2 WIGMORE, EVIDENCE, § 575 (3d ed. 1940); see also *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 135, 176 F.2d 45, 47 (1949). It involved different circumstances than the offense for which appellant was being tried. *Cf. Brown v. United States, supra* at 4. *Luck's* concern lest the appellate courts become stuck in the enveloping factual mire of each case is highly relevant here, where the balancing of factors was intricate and detailed. Under the statute governing the admission of prior convictions, which Congress enacted long ago, it was thought until *Luck* that the prosecution had total power to admit them (D.C. Code § 14-305). Certainly no construction of the statute allows courts to absolutely forbid all prior convictions from coming into evidence; discretion must be the rule. The function of this Court is to

provide standards and guidelines for the exercise of this discretion by trial courts, and this has been done. Once it is determined that discretion has in fact been exercised upon the "individualized considerations" of each case, this Court's function should be terminated. Since "discretion" was appropriately invoked and exercised in this case, this Court should, "in accord with sound judicial administration," arrest its inquiry at this point. See *Luck* v. *United States*, *supra* at 769; *Trimble* v. *United States*, No. 19,942, September 15, 1966 (Slip op. at 3).

This Court has recently declared that "where inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of his past misdeeds, may play an important part in the achievement of justice." *Smith* v. *United States*, No. 19,629, March 9, 1966 (slip op. at 3). The remark was dictum, for *Smith* involved a pre-*Luck* trial where no judicial discretion was involved. See also *Hood* v. *United States*, No. 19,650, June 30, 1966. Also, the defendant had never taken the stand. Of course in the present case, besides the inference from recent possession of stolen property, appellant's car was also positively identified as that used in the crime. But even so, *Luck's* concern for appellate detachment from the multitude of hair-line factual variations presented by each case involving prior convictions suggests that *Smith's* dictum is not a rigorous mandate to trial courts. It is another "factor" for the broth, and its violation should not invoke automatic reversal.

Were it not for some disquieting indications in the opinions, this analysis should end the tale. But as Judge Fahy recently indicated in his dissent in *Stevens* v. *United States*, No. 19,883, October 20, 1966 (slip op. at 4-5), some members of the Court appear to believe that "perhaps the evidence of a prior criminal record should be limited to a conviction which bears clearly on credibility —perjury, for example. The whole subject needs further study in the interest of the integrity of trials for crime." And this Court has remarked on a danger that the use of

prior convictions "not only permits the prosecutor to throw doubt upon the defendant's testimony regarding the facts of the case being tried, but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community. *Richards* v. *United States*, 89 U.S. App. D.C. 354, 357, 192 F.2d 602, 605 (1951), *cert. denied*, 342 U.S. 946 (1952). Even cautionary instructions 'cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another.' *Awkard* v. *United States*, —— U.S. App. D.C. ——, 352 F.2d 641, 646 (1965)." *Pinkney* v. *United States*, No. 19,925, July 8, 1966 (slip op. at 3). See also *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 135, 176 F.2d 45 (1949); *Commonwealth* v. *Bonner*, 97 Mass. 587 (1867), quoted in 3 WIGMORE, EVIDENCE § 890 (3d ed. 1940).[4]

[4] Wigmore's position on prior convictions used to impeach is somewhat unclear. He had "no hesitation" in accepting the rule that "a defendant taking the stand as a witness may be impeached precisely like any other witness." 3 WIGMORE, EVIDENCE, § 890, at 380 (3d ed. 1940), and relied upon his central tenet that "evidence admissible for one purpose is not to be excluded because it would be inadmissible for another purpose." See 1 WIGMORE, EVIDENCE § 13 (3d ed. 1940). He agreed that "the state has an overriding interest in ascertaining" the credibility of an accused who testifies in his own behalf, but he seemed to assume that only felonies would be used to impeach. 3 WIGMORE, *supra* at § 889. In another passage he said that under the general rule, "logically * * * only such instances should be used as are relevant to show a lack of truthfulness of disposition—for example, forgery, cheating, and the like." *Supra* at § 926. He was not insensitive to the dangers of the rule. See 1 WIGMORE, *supra* at § 194, p. 650.

McCormick favored the English rule and Rule 21 of the Uniform Rules of Evidence, both of which forbid any use of prior convictions to impeach credibility unless the defendant has advanced evidence in support of his credit or, under the English rule, attacked that of the prosecution witnesses. He spoke of the rule of "discretion", such as is *Luck* employs, as "the serpent of uncertainty (in) the

In *Luck*, this Court cited as "a highly desirable guide for the trial judges," Rule 303 of the American Law Institute's Model Code of Evidence, which emphasizes judicial discretion to exclude impeaching prior convictions if the "probative value is outweighed by the risk that its admission will * * * (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury * * *." *Luck* v. *United States*, *supra*, at 768-69 n. 8. However, the Court also cited to the strict English rule and quoted the similarly strict Rule 21 of the Uniform Rules of Evidence, which provides that only crimes involving "dishonesty or false statement" may be used to impeach any witness and no prior offense can be used to impeach a witness who is the accused in a criminal proceeding unless he brings forth evidence solely in support of his own credibility. Radiations from *Brown* v. *United States*, No. 20,041, November 10, 1966, reinforce the hesitant implication latent in *Luck's* citation to Rule 21. In *Brown*, the defendant was on trial for assaulting a police officer with a dangerous weapon (a knife). He requested a ruling under *Luck* on whether his 1964 conviction for assault with a dangerous weapon (a knife) could be used to impeach his credibility. The

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Eden of trial administration. * * * It seems questionable whether the creation of a detailed catalogue of crimes involving 'moral turpitude' and its application at the trial and on appeal is not a waste of judicial energy in view of the size of the problem. Moreover, it seems that shifting the burden to the judge's discretion is inexpedient, since only in a minority of cases will the judge have adequate information upon which to exercise such discretion." McCormick, Evidence 89-94 (1954).

The federal courts generally do not seem to follow a consistent rule. The First Circuit, for example, allows only felonies to be used. *Scaffidi* v. *United States*, 37 F.2d 203 (1st Cir. 1930). There is no overriding federal statute, and the courts have developed their practices on their own.

On the efficacy of "curative" instructions, see *United States* v. *Tramaglino*, 197 F.2d 928, 932 n. 2 (2d Cir. 1952); Note, *Other Crimes Evidence*, 70 Yale L. J. 763 777 n. 89 (1961). In civil law countries and most other parts of the world of course, evidence of propensity to commit crime forms a part of the basic evidence in the case.

trial court ruled it could because of the court's "abstract" belief the defendant might lie to avoid the harsher consequences on sentencing, and he subsequently elected not to testify. This Court noted that the defendant might have been prejudiced by the admission "especially where, as here, the prior offense is a crime similar to the one on trial." (Slip op. at 4).

Brown's holding imports no radical departure from prior law. Indeed, the Court had no escape from reversal on the facts before it if it were to preserve *Luck's* discretionary rule. The trial court had ruled in favor of admission solely on the "abstract" possibility that the adverse impact of a prior conviction on the defendant's sentence would provide him with a motive to lie. Since this motive exists for all defendants with prior convictions, under this formula no prior conviction would ever be excluded: "As is obvious, should such an abstraction be permitted to prevail *Luck* would be rendered meaningless," and courts would return to the "automatic impeachment rule *Luck* sought to change." (Slip op., at 6.) *Brown* exemplifies this Court's function when trial courts fail to exercise discretion at all, and when this failure results in keeping the accused off the witness stand. Neither event occurred here.[5]

In the course of its opinion the Court said that: "The reason for exposing a defendant's prior record is to attack his character; to call into question his reliability for truth-telling by showing his prior relevant antisocial conduct." As this Court had earlier said: "the basis of the admissability of convictions always was and always should be grounded upon the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying." *Clawans* v.

[5] If the Court rejects the argument advanced here, and treats *Brown* as an abuse of discretion case, it is distinguishable from the present case on the grounds that the prior offense here was entirely different from the offense on trial, and the appellant here did tell his story to the jury. Whatever prejudice might have ensued was of a radically different degree than in *Brown*.

District of Columbia, 61 U.S. App. D.C. 298, 299, 62 F. 2d 383 (1932). See also 1 WIGMORE, EVIDENCE § 194, at 650 (3d ed 1940). It is impermissible, therefore, to consider a motive to falsify in deciding admissibilty, for all defendants have such a motive—to escape punishment—and the jury is carefully instructed on this inevitable "interest." *Brown, supra* at 6.[6] The court then indicated that in balancing the factors indicated in *Luck* the trial judge "should focus on just how relevant to credibility a particular conviction may be." (citing to Rule 21's "dishonesty or false statement" standard and the stricter Model Code of Evidence Rule 106). "While one who has recently been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault has no such bearing on credibility. Certainly the prior assault establishes a history of violent behavior, but proof of prior violent behavior is inadmissible to prove assault." *Supra* at 6-7.

It is in this refined concept of relevancy that the radical emanations of *Brown* appear. If a prior assault with a dangerous weapon shows violent propensities but is not "relevant" to credibility, then it would follow that, at minimum, only crimes indicating "dishonesty or false statement" would be so relevant—in short, Rule 21 of the Uniform Rules of Evidence would have been engrafted, in part, into Section 14-305 of the D.C. Code.[7] This even though the Court indicated the problem was one for "the

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[6] For a history of the rule disqualifying "interested parties," see *Ferguson* v. *Georgia*, 365 U.S. 570, 573-78 (1961); 2 WIGMORE, EVIDENCE § 575 (3d ed. 1940).

[7] Crimes of "dishonesty of false statement" would presumably include perjury, subordination of perjury, conspiracy to procure the absence of witnesses, barratry, forgery, uttering forged instruments, bribery, suppression of evidence, false pretenses, cheating, and embezzlement. See Note, *Other Crimes Evidence at Trial*, 70 Yale L.J. 763, 775, n.73 (1961). It is not obvious just how much more "relevant" to the risk a particular accused will lie on the stand are crimes within this category than are those not within it, although certainly there is some increased tendentiousness.

drafter of the proposed Federal Rules of Evidence." *Supra* at 7, n.8.

Of course the rule of decision under Section 14-305 has, from its incipiency, been otherwise, and Congress has acquiesced in that construction. In *Bostic* v. *United States*, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), *cert. denied*, 303 U.S. 635 (1938), this Court held that a simple assault conviction could be used to impeach the testimony of one accused of murder. The defendant's argument that only crimes conforming to the common law standard of "moral turpitude" could be used to impeach a witness was explicitly rejected by this Court, which construed the statutory term "crime" to include the misdemeanor of simple assault. In this construction the Court was following *Murray* v. *United States*, 53 App. D.C. 119, 288 F. 1008, *cert. denied*, 262 U.S. 757 (1923), in which five prior misdemeanors, the last of which had occurred ten years before, were allowed to impeach the accused in a felony trial. And in *Goode* v. *United States*, 80 U.S. App. D.C. 67, 68, 149 F.2d 377 (1945), this Court approved the use of two prior grand larceny convictions to impeach a defendant accused of the sale of narcotics, "irrelevant though they may appear to be * * *." *Richards* v. *United States*, 89 U.S. App. D.C. 354, 192 F.2d 602 (1951), *cert. denied*, 342 U.S. 946 (1952), presented the issue of whether a prior conviction for which the defendant had been pardoned under a general amnesty was properly used to impeach him, and this Court held it was: "Since the rule is statutory in the District of Columbia, there may be real doubt as to our power to create such an exception (for pardoned offenses)." The "basic purpose and reasoning of the legislation (is) that when the jury comes to assess the truth of any man's testimony it should be allowed to consider his previous criminal activity and its impact on his trustworthiness. * * * If the general rule permitting impeachment of a defendant is valid, *and we are bound so to consider it*, then we think it follows that we should not create an exception in cases of the present sort." *Supra* at 357, 359 (emphasis supplied). In *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949),

this Court held that prior convictions not yet final could not be used to impeach, and in dictum indicated dissatisfaction with the holdings in *Murray* and *Bostic* that misdemeanors outside the penumbra of the common law standard of "infamous crimes involving moral turpitude" could be so used. "But we are not disposed to disturb a statutory construction which has been followed for more than a quarter of a century, especially since Congress has not seen fit during that long period to manifest dissatisfaction with it by amending the Code provision. Under that interpretation, if Campbell had been finally convicted of petit larceny, it was not error to allow that fact to be elicited from him by cross-examination or to be shown by evidence aliunde." *Supra* at 135. Finally, *Luck* itself sanctioned the use of a prior grand larceny in a prosecution for housebreaking and larceny, this Court holding the issue on retrial was "to be decided according to (the trial court's) best justment in the light of the record as it develops before him." *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763, 769 (1965).

Prior convictions not within the scope of Rule 21's "dishonesty or false statement" standard have thus been consistently allowed by this Court to impeach defendants under § 14-305, and with the responsibility for this construction and its alteration squarely upon Congress, this Court may not repudiate this rule. See, *e.g.*, *Trimble* v. *United States*, No. 19,942, September 15, 1966; *Bostic* v. *United States*, *supra*. *Brown* held simply that "discretion" imports "individualized considerations" and not "abstractions" which would apply to every case; its result was necessary to preserve the integrity of the discretionary rule. Its holding does not violate the plain message of legislative silence in the wake of *Murray*, *Bostic*, *Campbell*, *Trimble* and *Luck*.

Since *Brown's* dictum cast some fog over the law of prior convictions under D.C. Code § 14-305, this Court should now dispel it. It is apparent that prior convictions which do not fall within the ambit of Rule 106 of the Model Code of Evidence or Rule 21 of the Uniform Rules

of Evidence are nonetheless "relevant" under § 14-305 to the truthtelling capacity of a defendant who takes the stand, under the traditional notion that such defendants have once evidenced their disregard for the law and may well do so again. Such relevance is indisputable in view of the universal rule that a defendant may introduce similar evidence of good character to show his lack of propensity to commit crime. Judicial "discretion" to exclude must be "meaningfully invoked" by the recitation of appropriate factors. *Hood* v. *United States*, No. 19,650, June 30, 1966 (Slip op. at 4); see also *Walker* v. *United States*, No. 19,962, June 9, 1966. And once invoked, the trial court must consider only the "individualized considerations" of the case at hand, and must balance relevancy to the risk of falsehood against the risk of prejudice. *Brown*, *supra*. If this is done, in accord with its "respect appropriately reflective of the inescapable remoteness of judicial review," *Luck*, *supra* at 769, this Court will not disturb the balance so determined except in circumstances amounting to an abdication of discretion.

III. The court did not err, much less "plainly" err, in not specifically instructing the jury that one convicted of aiding and abetting must have wilfully participated in the offenses charged, since this fact was clear beyond peradventure from the charge as a whole.

(Tr. 131-35)

In this Court, appellant objects for the first time to Judge Matthews' charge to the jury because he thinks "the jury could have believed appellant's testimony but nevertheless viewed his actions, however innocent, as assistance and hence criminal under the law as the court had set it forth in the charge." (Brief for Appellant, at 25). But appellant's whole defense at trial was that he had not participated and knew nothing of the stolen goods. And Judge Matthews paraphrased the aiding and abetting law in language which clearly denoted an element of

intent.[8] She then said: "If two people together commit an offense and they join in committing an offense, then each is responsible just as though he did all of the physical acts involved in the criminal undertaking. In other words, if one person aids or abets, that is, assists or helps another person in the commission of a crime, the person so aiding or abetting is guilty of the completed offense as though he had, himself, committed it entirely." (Tr. 131-32). Although it is literally possible to distort the plain meaning of this paragraph in the manner appellant does here, and come up with the meaning that one may violate the law by innocently "assisting or helping" a criminal endeavor, such a distortion requires the jury to believe and act upon a law punishing innocents which revolts every common canon of decency and justice. Common sense compels recognition that not even the most callous jury would so construe this law or act upon it. Appellant's argument on this point is imaginative, but specious.

Moreover, his argument requires that the jury pluck out one passage in a long instruction from a context pregnant with the meaning he denies. Immediately following the passage quoted, Judge Matthews read and summarized the indictment and quoted the statutes violated in words which hammered home the necessity for a criminal intent. The indictment charged appellant and Williams with having "entered * * * with intent to steal" and with "stealing" the property subsequently found. (Tr. 132.) The statute defining "housebreaking" proscribes entering "with intent to commit any criminal offense * * *". Judge Matthews summarized the "essential elements" of the

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[8] Now, we have in the District of Columbia a law which is referred to as the aiding and abetting law. This law provides that, in a prosecution for any criminal offense, any person aiding or inciting or conniving at the offense, or aiding or abetting the principal offender, shall be charged as a principal. You are told that a person who advises, incites or connives at any offense, or aids or abets the principal offender, is himself a principal offender under this law; in other words, such a person is just as responsible under the law as the person who commits a physical act which violates the law. (Tr. 131.)

crime of housebreaking as the (1) entering of a building (2) owned by another (3) "with the intent to steal the property of another." (Tr. 133). She reiterated the necessity for the jury to find each of these elements to have been established beyond a reasonable doubt. And "under this aiding and abetting law about which I spoke to you, a person commits a criminal offense if he, himself, does the things that constitute the criminal act, or if he aids or abets another to do so." (Tr. 134). She then summarized the grand larceny count as the (1) "unlawful" taking of property belonging to another (2) valued in excess of $100 (3) "with the fradulent intent to convert it to his own use." (Tr. 134). This element of intent was reiterated twice more immediately thereafter. (Tr. 135).

It is obvious that this charge hammered home the need that a criminal intent be proven beyond a reasonable doubt in order to convict appellant as an aider and abettor. Although many words were used in the trial court's definitions of "aid and abet", all words denoting active participation in "wrongdoing," [9] the gist of it lies in the notion that one aiding and abetting "is just as responsible under the law as the person who commits a physical act which violates the law." (Tr. 131). This is a rule of equality; it is ridiculous to suppose that an aider and abettor could be punished for possessing an innocent intent while the principal with such an intent would go scot free. Yet this is the supposition which appellant contends the jury might have adopted. Only a jury of feeble wits would do so, and our Constitutional guarantee supposes a more noble institution. Appellant never challenged its composition on that ground at trial, as he similarly failed to object to Judge Matthews' charge on the ground of his present objection.

The charge here plainly communicated that appellant had to have actively participated in the venture "as in something that he wishes to bring about" before he could

[9] *Webster's New World Dictionary* defines "abet" as "to incite, sanction, or help, especially in wrongdoing."

be found guilty as an aider and abettor. *Nye & Nisson* v. *United States*, 336 U.S. 613, 619 (1949), quoting L. Hand, J. in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). *Cf. United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962); *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965); *Moore* v. *United States*, 356 F.2d 39 (5th Cir. 1966); *Long* v. *United States*, —— U.S. App. D.C. ——, 360 F.2d 829 (1966); *Cooper* v. *United States*, —— U.S. App. D.C. ——, 357 F.2d 274 (1966). In *Cooper*, the trial judge in his summary mistakenly said that the defendant had been identified "as one of the three persons who attacked and robbed" the victim, while in fact the defendant had been merely spotted at the scene of the events. In these circumstances "the jury was specifically told that knowledge was sufficient for guilt," *supra* at 279, instead of participation in a more active sense. In *Garguilo*, the instructions and explanations highlighted mere knowledge of the crime rather than the "purposive participation" necessary under the law, and the jury had asked specifically for clarification on the point. *Supra* at 254-55. In *Kemp* v. *United States*, 114 U.S. App. D.C. 88, 311 F.2d 774 (1962) *(per curiam)*, the evidence against the defendant only showed that he rode in a stolen car driven by a friend who had driven him before in his brother's car. The Court said that the defendant's use of the automobile "was as consistent with innocence as with guilt," and that to infer "guilty knowledge" was an "impermissible speculation" on those facts. *Supra* at 89. The situation there hardly parallels the one here, where appellant was found a few minutes after the crime driving his own car with the stolen goods secreted in his trunk.

None of these cases nor any cited by appellant support his contention that Judge Matthews' charge was erroneous in the respect now criticized. It clearly instructed them properly as to the need to prove intentional assistance as an aider or abettor. There was no error committed, much less the "plain error affecting substantial rights" necessary in this case to invoke this Court's power under Rule 52, FED. R. CRIM. P.

IV. The charge as a whole did not unduly emphasize the government's side of the case.

(Tr. 103, 126-39, 142)

At the close of the court's charge to the jury, appellant's trial counsel objected to the trial court's "recharging the jury on the inference on the recently stolen property" on the ground that doing so "militates against the defendant." (Tr. 142). In response, the court charged the jury that they were "not to single out some particular instruction and accentuate that and overlook others," but rather were to "consider it in its entirety." (Tr. 142). Appellant now argues that "the charge, taken as a whole, instructed the jury almost entirely on the government's theory of the case, and almost nothing was said concerning appellant's defense, certainly not of its specifics." (Brief of Appellant at 25-6). Appellant never asked for any special instructions before the charge (Tr. 103) and certainly did not object at trial to any preponderance of the charge in the government's favor. He could not have, because there was none. The vast bulk of the charge concerned the law for the violation of which appellant was on trial. (Tr. 126-38). One page, equally divided, concerned the evidence in the case for both sides (Tr. 138-39). Every instruction sought by appellant's counsel was given by the court. The charge was not only correct; it was fair and reasonable. It neither prejudiced the appellant in any way nor forms the basis for a challenge to his conviction under the "plain error" rule. Fed. R. Crim. P. Rule 52.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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